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ABSTRACT

Guidance is provided in question and answer format on the common themes running through court opinions, Federal laws and regulations, State laws and regulations, and interpretations concerning the rights of limited English Proficient (LEP) students. First, the legally acceptable, common procedure for identifying LEP pupils is described as entailing the assessment of parent responses to a Home Language Survey and the subsequent testing of students' oral reading and writing skills. Second, the minimal standards for LEP assistance are detailed, in terms of teachers' qualifications and the time spent with the pupil. Third, while bilingual instruction is not mandatory under Federal legislation, the legally and educationally safe posture is said to be the offering of bilingual instruction. Fourth, the minimal standards of a bilingual program are described as (1) a bilingual teacher, (2) teacher assessment, and (3) provision of material resources. Fifth, the standards for the removal of a student from a program are outlined. Sixth, every district is said to be required to monitor the program and make reasonable adjustments as well as monitor the progress of students while they are in the program and after they have left it. Seventh, it is held that a district may not deny a student services because there are few students in the district who speak his or her language. (RDN)

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RIGHTS OF LIMITED ENGLISH PROFICIENT STUDENTS UNDER FEDERAL LAW - A GUIDE FOR SCHOOL ADMINISTRATORS

by

Peter D. Roos

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RIGHTS OF LIMITED ENGLISH PROFICIENT STUDENTS UNDER FEDERAL LAW - A GUIDE FOR SCHOOL ADMINISTRATORS

BY: PETER D. ROOS, ESQ.

As any school administrator knows, the past decade has seen a virtual deluge of court opinions, federal laws, federal regulations and policies, state laws, state regulations and interpretations of all of these concerning the rights of Limited English Proficient students. It is the thesis of this short guide that there are a number of common themes that run through these authorities which provide fairly sure guidance for the conscientious administrator. These are set forth through a question and answer format. Several notes of caution are however advisable. First, the federal authorities relied upon provide a minimum necessary for legal compliance. State laws may be more specific or more protective than the federal precedents discussed; where this is the case, their terms must be followed. Secondly, laws change as do legal precedents. While this guide seeks to identify recurring themes upon which reliance can be placed, nothing is immutable. Thus, it is always worthwhile to make a final check to assure complete compliance with the law.

QUESTION:

Is there a legally acceptable, commonly practiced procedure for identifying Limited English Proficient (L.E.P.) pupils?

ANSWER:

Yes. The legal obligation is to identify all students who have problems speaking, understanding, reading or writing English due to a home language background other than English. In order to do this, a two-phase approach is common and acceptable. First, the parents are asked, through a Home Language Survey or on a registration form, whether a language other than English is utilized in the child's home. If the answer is affirmative, then the second phase is triggered. In the second phase, those students identified through the Home Language Survey are given an oral language proficiency test and an assessment of their reading and writing skills. There are a half dozen or so acceptable oral

proficiency tests especially designed for this purpose; at present, most Districts use a percentile score on the reading and language subparts of the C.T.B.S. or a similar standarized test to measure those skills. Legally a District should be safe from a charge that it failed to identify L.E.P. students if it treats all students who score below the 36th percentile as L.E.P. and thus, entitled to services.

QUESTION:

Obviously a student identified as Limited English Proficient, must be provided special English help. Are there any minimal standards for this?

ANSWER:

Yes. First, a number of courts have recognized that special training is necessary to equip a teacher to provide meaningful assistance to Limited English Proficient students. The teacher (and it is clear that it must be a teacher -- not an aide) must have training in second language acquisition techniques to teach English as a Second Language (E.S.L.). It is preferable, but probably not required, that the E.S.L. teacher have language skills sufficient to communicate with her students.

Secondly, the time spent on assisting the student must be sufficient to assure that he acquire English skills quickly enough to assure that his disadvantage in the English language classroom not harden into a permanent educational disadvantage. For the student with an oral language limitation, this may mean a minimum of two periods a day of intensive small group instruction. For the student able to speak and understand English, but with difficulty writing it, it may be sufficient to offer one period a day.

QUESTION:

Must I provide students with Bilingual instruction?

ANSWER:

At the present time, the federal obligation has not been construed to affirmatively compel a Bilingual program. As a practical matter, however, the federal mandate is such that a District would be well advised to offer a Bilingual program whenever it is possible. I will explain.

The federal mandate is not fully satisfied by an E.S.L. program. The mandate requires English language help plus programs to assure that the student not be substantively handicapped by any delay in learning English. To do this requires either a Bilingual program which keeps the student up in his course work while learning English or a specially designed compensatory program to address the educational loss suffered by any delay in providing understandable substantive instruction. To do the latter in addition to making the considerable expenditure to hire E.S.L. teachers is a vastly more expensive and complicated procedure than the provision of bilingual instruction. It is also more problematic educationally. Thus, the legally and educationally safe posture is to offer Bilingual instruction whenever it can be done.

QUESTION:

What minimal standards must be met if a Bilingual program is to be offered?

ANSWER:

The heart of a basic Bilingual program is a teacher who can speak the language of the student as well as address the students' Limited English Proficiency. Thus, a District offering a Bilingual program must take affirmative steps to match teachers with these characteristics with Limited English Proficient students. These might include allocating teachers with language skills to Bilingual classrooms, not allowing tenure or traditional practices or procedures to interfere with such allocations, and affirmative recruitment of Bilingual teachers. Additionally, it requires the District to establish a formal system to assess teachers to assure that they have the prerequisite skills. Finally, where there are insufficient teachers, there must be a system to assure that teachers with most (but not all) of the skills be in Bilingual classrooms, that those teachers be on a track to obtain the necessary skills, and that Bilingual aides be hired whenever the teacher lacks the necessary language skills.

Finally, it is legally necessary to provide the material resources necessary for both the E.S.L. and bilingual components. The program must be reasonably designed to succeed. Without adequate resources, this requirement cannot be met.

QUESTION:

Must there be standards for removal of a student from a program? What might these be?

ANSWER:

There must be definite standards. These generally mirror the standards for determining whether a student is L.E.P. in the first place. Thus, objective evidence that the student can compete with his English speaking peers without a lingering language disability is necessary.

Several common practices are unlawful. First, the establishment of an arbitrary cap on the amount of time a student can remain in a program fails to meet the requirement that all L.E.P. students be assisted. Secondly, it is common to have programs terminate at a certain grade level e.g., 6th grade. While programs may change to accommodate different realities, it is unlawful to deny a student access to a program merely because of his grade level.

QUESTION:

Must a District develop a design to monitor the success of its program?

ANSWER:

Yes. The District is obligated to monitor the program and to make reasonable adjustments when the evidence would suggest that the program is not successful.

Monitoring is necessarily a two part process. First, it is necessary to monitor the progress of students in the program to assure (a) that they are making reasonable progress toward learning English and (b) that the program (Bilingual or other) is providing the student with substantive instruction comparable to English proficient pupils. Secondly, any assessment of the program must include a system to monitor the progress of students after they leave the program. The primary purpose of the program is to assure that the L.E.P. students ultimately are able to compete on an equal footing with their English-speaking peeers. This cannot be determined absent such a post-reclassification monitoring system.

QUESTION:

May a district deny services to a student because there are few students in the District who speak his language.

ANSWER:

No. A federal law adopted in 1974, following the Supreme Court's decision in Lau v. Nichols, makes it clear that every student is entitled to a program that is reasonably designed to overcome any handicap occasioned by his language. Numbers may, obviously, be considered to determine how to address the student's needs. They are not a proper consideration in determining whether a program should be provided.

LEADING FEDERAL AUTHORITIES

1. Title VI, Civil Rights Act of 1964, 42 U.S.C. §200d. et seq.

2. 45 C.F.R. Part 80 (H.E.W.)

3. May 25, 1970 Memorandum (H.E.W.) 35 Federal Register 11595 (1970).

4. Lau v. Nichols, 414 U.S. 563 (1974)

*5. Equal Educational Opportunities Act of 1974, 20 U.S.C. §1703(f).

6. Serna v. Portales 499 F.2d 1147 (10th Civ., 1974)

7. ASPIRA v. Board of Education, 394 F.Supp. 1161 (S.D.N.Y.; 1975)

8. Lau Guidelines, H.E.W. Memorandum (Summer, 1975)

9. Rios v. Read, 73 F.R.D. 589 (E.D.N.Y., 1977)

10. Cintron v. Brentwood Union Free School District, 77 Civ. 1310 (E.D.N.Y.), Memorandum of Decision and Order (August 22, 1977) (unpublished)

> "It is apparent that, in the event state tenure law frustrates the purpose and effectiveness of Title IV and 20 U.S.C. §1703(f), 'the state law must yield to the regulation of Congress within the sphere of its delegated power.'

11. Cintron v. Brentwood Union Free School District 455 F. Supp. 57 (E.D.N.Y., 1978)

12. Rios v. Read, 480 F. Supp. 14 (E.D.N.Y., 1978)

*13. Casteneda v. Pickard 648 F2 989 (5th Cir. 1981)

14. United States v. Texas 680 F2 356 (5th Cir. 1982)

*15. Keyes v. School District #1, Denver 540 F.Supp. 399 (D. Colo. 1983)

*Most useful authorities.